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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

FLOREN DI PAGLIA, *Petitioner*

vs.

STATE OF IOWA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

COUNSEL FOR PETITIONER,
DON HISE,
Attorney at Law,
605 Savings & Loan Bldg.,
Des Moines 9, Iowa.

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Pursuant to Rule 23 of the Rules of the Supreme Court of the United States, the Petitioner prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the State of Iowa entered in the above entitled cause.

CITATIONS TO OPINIONS BELOW

The cause was twice before the Supreme Court of Iowa. The first opinion was filed July 27, 1955, and is reported in 71 N. W. 2nd 601. The second opinion was filed September 18, 1956, and is reported in 78 N. W. 2nd 472. A petition for rehearing on the first appeal was denied October 21, 1955, and a petition for rehearing on the second appeal was denied November 16, 1956.

On said day, November 16, 1956, petitioner made application to the Supreme Court of Iowa, stating that he intended to petition the Supreme Court of the United States for a Writ of Certiorari to review the decision and praying

that the Supreme Court of Iowa enter an order directing the Clerk of said Court to withhold the issuance of Procedendo for a reasonable time, not exceeding 90 days, or until further order, in order to give Petitioner an opportunity to petition for a Writ of Certiorari to the Supreme Court of the United States.

The Supreme Court of the State of Iowa thereupon, on November 16, 1956, entered an order granting the prayer of the Petitioner's application as prayed for.

STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION

The statutory provision believed to confer jurisdiction upon the Supreme Court of the United States to review the judgment by Writ of Certiorari is found in 28 U. S. C. A., Sec. 1257, Subsection (3).

QUESTIONS PRESENTED FOR REVIEW

Whether or not a statute of the State of Iowa is void as being repugnant to the 14th Amendment to the Constitution of the United States in two respects: (1) that it provides for cruel and unusual punishment, and (2) that it denies a person convicted thereunder the equal protection of the laws.

Section 739.12, Code of Iowa, 1954, prohibits bribery in athletic contests. The penalty for a violation thereof provides that a person convicted thereunder shall be "Sentenced to pay a fine not exceeding ten thousand dollars, or undergo imprisonment not exceeding ten years, or both".

Petitioner was convicted under said section and was originally sentenced to an indeterminate period not to exceed ten years to the Men's Reformatory at Anamosa. On the first appeal of this cause, the Supreme Court of Iowa held that since no place of confinement was specified in the statute, that it should be classified as a misdemeanor, and not a felony, that therefore imprisonment must be in a county jail, and remanded the cause to the District Court for resentencing.

The District Court of Polk County, Iowa, thereafter sentenced the petitioner to five months at hard labor in the Polk County jail, and to pay a fine of $1,000.00. On the second appeal, said judgment was affirmed by the Iowa Supreme Court.

It is the contention of petitioner that the statute in question is void because it has been interpreted to permit the imprisonment of a person convicted thereunder to a term of 10 years in a county jail in Iowa, (or more if a fine is also imposed and not paid), and that because of the type of county jails in Iowa, of which the Court could take judicial notice, such punishment would be cruel and unusual.

It is the further contention of petitioner that said statute is void because it provides for a term in a county jail greatly in excess of the punishment for any other misdemeanor. No other statute has been found in Iowa which provides for imprisonment for a misdemeanor in excess of one year in a county jail.

CONSTITUTIONAL PROVISIONS

The Constitutional provisions involved are found in the 14th Amendment to the Constitution of the United States which provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner was indicted in Polk County, Iowa, being charged with a violation of Sec. 739.12 Code of Iowa, 1954, which provides as follows:

"Bribery in athletic contests. Whoever gives, promises, offers or conspires to give, promise or offer, to anyone who

participates or expects to participate in any professional or amateur game, contest, match, race or sport; or to any umpire, referee, judge or other official of such game, contest, match, race or sport; or to any owner, manager, coach or trainer of, or to any relative of, or to any person having any direct, indirect, remote or possible connection with, any team, individual, participant or prospective participant in any such professional or amateur game, contest, match, race or sport, or the officials aforesaid, any bribe, money, goods, present, reward or any valuable thing whatsoever, or any promise, contract or agreement whatsoever, with intent to influence him or them to lose or cause to be lost any game, contest, match, race or sport, or to limit his or their or any person's or any team's margin of victory in any game, contest, match, race or sport, or to fix or throw any game, contest, match, race or sport, shall be sentenced to pay a fine not exceeding ten thousand dollars, or undergo imprisonment not exceeding ten years, or both."

Petitioner was found guilty by a jury and Court adjudged that he be committed to the Men's Reformatory at Anamosa for an indeterminate period not to exceed ten years. He appealed said conviction to the Supreme Court of the State of Iowa, and said Court held that since the statute under which he was convicted did not specify that it was a felony and did not specify the place of imprisonment, that the offense was only a misdemeanor and was punishable in the county jail and not the Reformatory. The Court remanded the cause to the Polk County District Court for judgment, sentencing petitioner to pay a fine, "Not exceeding $10,000.00, or undergo imprisonment in the county jail, not exceeding ten years, or both, with costs, as the trial court may determine is proper." (71 N. W. 2nd 601, 607.)

Thereafter the District Court of Polk County, after a hearing and after overruling motions, the pertinent parts of which are hereinafter set forth, sentenced petitioner to a term of five months at hard labor in the Polk County Jail and to pay a fine of $1000.00.

In due time, petitioner appealed said judgment to the Supreme Court of Iowa, and said Court affirmed same. (77

N. W. 2nd 472.) The record on said appeal was prepared by R. E. Hanke, now deceased, and while present counsel understands that there was some evidence presented in the District Court regarding the plant and the available facilities at the county jail, no part of said testimony was abstracted nor presented to the Supreme Court of Iowa in said record. At the present time, we rely upon the premise that both the District Court and the Iowa Supreme Court should take judicial notice of the physical make-up and the facilities for caring for prisoners in each of the county jails in Iowa.

The petitioner first urged a violation of the 14th Amendment in his demurrer to the original indictment, stating among other things:

"That said Act is in violation of the Constitution of the United States and in violation of the 14th Amendment thereof, as well as the Constitution of the State of Iowa, as provided for in Article I, Section 6 thereof, more particularly for the reason that it denies to this defendant within the jurisdiction of the State of Iowa, the equal protection of the laws for the further reason that it constitutes class legislation as defined in Section 6, Article I of the Constitution of the State of Iowa."

Said demurrer was overruled.

After a jury finding of guilty and before sentence, petitioner again raised the question in his Motion in Arrest of Judgment, stating among other things:

"(a) That the entire act is void in violation of both the Constitutions of the United States (the Fifth and the Fourteenth Amendments) and by violation of the State Constitution of Iowa, and more particularly 'Article 1, Section 17.'

"By way of explanation of the violation of the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States in that it denied unto this defendant due process."

"(c) That the penalty as prescribed by the legislature provides for no place of commitment. That by strict construction of said penalty the prohibited act became an indictable misdemeanor. That the maximum penalty pro-

vided for under said act would be a term of 18-1/3 years as a punishment for an indictable misdemeanor. Such a penalty shocks the public conscience and such constitutes an excessive fine and cruel and unusual punishment making the pronouncement of the punishment illegal and void. Said prohibition as set forth in the act without a penalty for its violation is a void act."

Said motion in Arrest of Judgment was overruled.

The Notice of Appeal to the Supreme Court of Iowa on the second appeal stated, among other things:

"Further appealing from the adverse rulings of the trial court wherein defendant contended that the statute under which he was indicted was unconstitutional in that it denied due process, in violation of the United States Constitution."

The matter was argued and the Supreme Court of Iowa held that statute in question did not violate the 14th Amendment.

REASONS FOR GRANTING THE WRIT

The Statute in question (Sec. 739.12, Code of Iowa, 1954) has been held to be an indictable misdemeanor and not a felony, and yet the penalty for its violation may be a long term of years in a county jail.

It is the only statute in Iowa which has come to our attention which is a misdemeanor, and still provides for a term of imprisonment in a county jail in excess of one year.

In Iowa, we have a Men's Reformatory and a Penitentiary, both of which are institutions having facilities for the humane confinement of long-term prisoners, together with adequate facilities to rehabilitate prisoners and give them something to do to occupy their minds and bodies.

This is not so with respect to county jails in Iowa, of which we have ninety-nine, and which it is submitted were never designed nor equipped for the confinement of long-term prisoners.

It is further submitted that confinement in a county jail is much more severe than confinement in the reformatory or in the penitentiary in Iowa. Confinement in a county jail is pure confinement, with no chance to work at a trade,

or have open-air exercise, or have a minimum of recreation, which is generally provided for in most, if not all, modern and enlightened reformatories or penitentiaries.

In its filed opinion (71 N. W. 2nd 661) the Supreme Court of Iowa cited *People v. Brooks*, 14 Colo. 413, 415, 24 P. 553, and quoted with approval from said case as follows:

"in case the statute admits equally of two constructions, *that which is the more favorable to the defendant is to be preferred;* and when the statute is silent as to the place of imprisonment, there being county jails for persons convicted of misdemeanors, and a penitentiary for those guilty of higher crimes, the former, *rendering the punishment less severe, must be selected.*" (italics supplied)

And yet the Supreme Court of Iowa held that punishment in a county jail for a period of ten years would be perfectly proper even though such type of punishment has never been known in Iowa.

The type of punishment may be so severe that it falls within the prohibition of the 14th Amendment. It was so held in *Weems v. United States*, 217 U. S. 349, 54 L. Ed. 793, 30 S. Ct. 544, 19 Ann. Cas. 705, wherein a statute was held to provide for cruel and unusual punishment which called for a term of 12 to 20 years at hard and painful labor, for carrying a chain at the angle from the wrist, no outside assistance, disfranchisement, deprivation of parental and marital authority, and to be subject to police surveillance for life.

It is submitted that the instant case is governed by *Weems v. U. S.* (supra), and that confinement of a prisoner in a place where his mind and body can only stagnate for a long period of time, is, in fact, cruel and unusual punishment and a denial of due process.

Other cases have held certain punishments to fall within the prohibition of the 14th Amendment. See *State v. Ross*, 55 Or. 450, 104 P. 596, 106 P. 1022, 42 L. R. A. (N. S.) 601, writ of error dismissed in 227 U. S. 150, 57 L. Ed. 458, 33 S. Ct. 220, wherein a sentence of approximately 800 years together with a fine of over one-half million dollars, was held to be cruel and unusual punishment.

In *Harper v. Wall*, D. C., N. J. (1949) 85 Fed. Sup. 783, it was held that the beatings of a fifteen year old colored boy to obtain a confession and subsequent conviction of burglary, without benefit of counsel, a sentence of ten years and subjection to the county camp labor system, amounted to cruel and unusual punishment and a violation of rights protected by the 14th Amendment.

In the case of *Davis v. Berry*, D. C. 1914, 216 Fed. 413, reversed on ground that questions had become moot, 37 S. Ct. 208, 242 U. S. 468, 61 L. ed. 441, it was held that an Iowa statute providing for the performance of the operation of vasectomy on criminals twice convicted of a felony, was unconstitutional as providing cruel and unusual punishment.

CONCLUSION

From all of the above it is the contention of the petitioner that a statute which is only a misdemeanor and which provides for a long term of years in a county jail in Iowa, is void, and in violation of rights protected by the 14th Amendment, and that this petition for a writ of certiorari should be granted.

Respectfully submitted,

DON HISE,
605 Savings and Loan Bldg.
Des Moines, Iowa
C. J. CARDAMON,
243 Insurance Exchange Bldg.
Des Moines, Iowa
Attorneys for Petitioner.

APPEARANCE

I, Don Hise, a member of the bar of the Supreme Court of the United States, do hereby enter my appearance for Floren Di Paglia, Petitioner.

.....

DON HISE,
605 Savings and Loan Bldg.,
Des Moines 9, Iowa.

PROOF OF SERVICE

I, ..., Assistant Attorney General of the State of Iowa, hereby acknowledge receipt of a copy of the foregoing Petition to the United States Supreme Court for a Writ of Certiorari to the Supreme Court of the State of Iowa, this ..... day of January, 1957.

.....

APPENDIX A

STATE OF IOWA, *Appellee*

v.

FLOREN DI PAGLIA, *Appellant.*

No. 48577
Supreme Court of Iowa.
July 27, 1955.

Rehearing Denied Oct. 21, 1955.

R. E. Hanke, Des Moines, for Appellant.

Dayton Countryman, Atty. Gen., Raphael R. R. Dvorak and George G. West, Asst. Attys. Gen., and Leo J. Tapscott, County Atty., Des Moines, for Appellee.

OLIVER, Chief Justice.

Defendant Di Paglia was indicted for bribery in athletic contest, it being charged he offered money to Benjamin James Bumbry, Jr., with intent to influence him to fix the score in a basketball game.

Defendant knew Drake University at Des Moines, had a basketball game scheduled with Iowa State College for December 22, 1953, and that Bumbry, with whom he was not personally acquainted, was a player on the Drake team. About December 15, 1953, defendant, under the assumed name of Charles Davis, after several days of intensive efforts to contact Bumbry, succeeded in doing so by telephon-

ing him at the place in Des Moines where Bumbry roomed. Bumbry testified defendant, in that conversation, said he would like to have Bumbry play ball for him. Bumbry declined and defendant then said he wanted to talk to Bumbry confidentially. Bumbry walked to a nearby grocery store and there was taken into an automobile by defendant, who identified himself as Charles Davis, and driven slowly around the block with a stop of ten or fifteen minutes.

Defendant "stated he didn't know how to approach me on the subject". He then asked, "would I shave points against Iowa State. He said Iowa State was supposed to win by eight and couldn't they win by ten," or more." • • • could you cause Drake to lose by ten points?" Bumbry said he didn't have anything to do with that. Defendant said there was nothing to be afraid of, the big cities were still doing it. He cautioned Bumbry not to tell any one. He then asked Bumbry if he thought Willie Cerf, another member of the Drake basketball team, "would do anything like that?" He told Bumbry there was some money to be made and asked Bumbry if he didn't like money. He first mentioned $300 and then "said he knew he could get a thousand dollars, we could split it three ways." He said, "Look what I could have at the end of the season, two or three G's." "He said if I did take it he would like for me to wait until the end of the season before I spent it."

Bumbry refused to consider defendant's proposition and reported the matter to his coach and others. The following morning defendant telephoned Bumbry and asked him if he had changed his mind. Bumbry said, "No, sir."

There was evidence also defendant inquired of a student Calvin Hicks, whether Bumbry and Cerf had dependents and could use some money, if $500 per game would satisfy them, and did Hicks think they would go along with something like that. Hicks answered in the negative. Defendant "said he didn't see where there would be anything wrong, the outcome of the game so far as winning or losing wouldn't be jeopardized in any way, just be a matter of shaving a few points."

As a witness defendant admitted he sought out Bumbry and took the latter into defendant's automobile substan-

tially as told by witnesses for the state and that at times he had used the name of Charles Davis and had used it in locating Bumbry. His story is he told Bumbry he was thinking of making a $200 or $300 bet on the Drake-Iowa State game and merely asked Bumbry if he thought Drake would win, or would win by eight or ten points and that Bumbry was non-committal on the subject.

The jury found defendant guilty and the court adjudged that he be committed to the Men's Reformatory at Anamosa for an indeterminate period not to exceed ten years. Defendant has appealed.

I. He assails the validity and sufficiency of the indictment and the validity of the statute, Chapter 254, Laws 55th G. A., now section 739.12, Code of Iowa 1954, I. C. A., which provides:

> "Bribery in athletic contests. Whoever gives, promises, offers or conspires to give, promise or offer, to anyone who participates or expects to participate in any professional or amateur game, contest, match, race or sport; * * * any bribe, money, goods, present, reward or any valuable thing whatsoever, or any promise, contract or agreement whatsoever, with intent to influence him or them to lose or cause to be lost any game, contest, match, race or sport, or to limit his or their or any person's or any team's margin of victory in any game, contest, match, race or sport, or to fix or throw any game, contest, match, race or sport, shall be sentenced to pay a fine not exceeding ten thousand dollars, or undergo imprisonment not exceeding ten years, or both."

The indictment states the Polk County Grand Jury "accuse Floren Di Paglia of Bribery in athletic contest as defined in Chapter 254 of the Laws of the Fifty-fifth General Assembly of the State of Iowa, and charge that Floren Di Paglia did offer to give money to Benjamin James Bumbry, Jr., with intent to influence him to fix the score of an amateur basketball game in which the said Benjamin James Bumbry, Jr., expected to participate, to-wit: Drake University versus Iowa State College."

(1) It charges the offense by using the name given it by the statute (Bribery in athletic contests) and referring to

the section of the statute creating such offense, Ch. 254, 55th G. A., and by specifying and describing the act charged as constituting the offense. This is sufficient to comply with section 773.3, Code of Iowa, 1954, I. C. A., which refers to the contents of indictments. *State v. Leahy*, 243 Iowa 959, 965, 54 N. W. 2d 447; *Meeks v. Lainson*, 246 Iowa . . ., 71 N. W. 2nd, 446; *State v. Keturokis*, 224 Iowa 491, 276 N. W. 600. See also other sections of Chapter 773, Code of 1954, I. C. A.

(2) II. Appellant asserts the minutes of the evidence upon which the indictment was found do not set out any evidence "Which would warrant the charge", and contends his demurrer to the indictment should have been sustained for that reason. This is contrary to the facts. The minutes disclose substantial evidence which supports the charge. However, the order overruling the demurrer to the indictment would not have been erroneous had the minutes not contained the evidence. *State v. Finnegan*, 244 Iowa 166, 172, 55 N. W. 2d 223, 226, points out:

> "• • • Such minutes are not part of the indictment. *State v. Briggs, supra*, 68 Iowa 416, 420, 27 N. W. 358. Grounds of demurrer must appear on the face of the indictment. Code section 777.2 I. C. A.; *State v. Lamb*, 239 Iowa 176, 180, 30 N. W. 2d, 734, 736; *State v. Boucher*, 237 Iowa, 772, 23 N. W. 2d 851."

(3) III. Appellant makes a general assault upon the validity of the statute (now Code section 739.12). He refers to common law definitions of bribery and to statutory crimes involving bribery and corruption which he asserts have in effect codified the common law and have also extended it. He questions the power of the legislature "to extend bribery to include an entirely new and different class of individuals, acts or omissions." We are unable to agree with the foregoing reasoning. Generally speaking, there are no common law offenses in Iowa and all crimes are statutory. *Estes v. Carter*, 10 Iowa 400; *State v. Banoch*, 193 Iowa 851, 186 N. W. 436.

(4-6). In creating an offense the legislature may give it a name known to the common law, without further defining it, or the statute may expressly refer to the common law for

definition. In such instances the common law definition will be applied. On the other hand, the legislature may define the offense by a particular description of the act or acts constituting it. *State v. Flory*, 203 Iowa 918, 924, 210 N. W. 961, 964; *State v. Loser*, 132 Iowa 419, 424, 104 N. W. 337, 338, 339. It is the rule that "if the statute clearly defines the thing or act which is forbidden, a resort to common-law definitions to add to or detract from the effect of the language of the statute is neither necessary nor permissible". *State v. Clough*, 181 Iowa 783, 785, 165 N. W. 59, 60. We have frequently said the legislature may be its own lexicographer and write its own definitions of words and terms. *Sandberg Co. v. Iowa State Board*, 225 Iowa 103, 107, 278 N. W. 643, 645, 281 N. W. 197; *Eysink v. Board of Supervisors*, 229 Iowa 1240, 1245, 296 N. W. 376, 378.

(7) In this case the legislature created an offense which it named, "Bribery in athletic contests". Clearly it was empowered to do that. It then proceeded to define that offense in detail. Appellant contends the statute is indefinite and uncertain and for that reason violative of the due process clauses of Article 1, Section 9 of the Constitution of Iowa, I. C. A. and of the 5th and 14th Amendments to the Constitution of the United States. This contention is not meritorious. The part of the statute involved in this case is not complicated. The only accusation in the indictment was that defendant offered to give money to Bumbry with intent to influence him to fix the score of the game. The court instructed the jury:

> "• • • the law applicable to the case on trial, is, that whoever offers to give money to anyone who expects to participate in any amateur game, with the intent to influence the expectant participant to fix the score of the amateur game, shall be punished as by said statute provided."

(8) One challenging a statute has the burden to overcome the presumption it is constitutional and to negative every reasonable basis upon which it may be sustained. *Knorr v. Beardsley*, 240 Iowa 828, 38 N. W. 2d 236. Appellant has not met this burden. There is no showing the pro-

visions of this statute which are involved in this case, are indefinite or uncertain. On the contrary, such provisions are explicit and the language clear. This statute is much more detailed than was the statute in *Glickfield v. State*, 203 Md. 400, 101 A. 2d 229, in which a contention it was fatally vague and indefinite was overruled and a conviction of attempting to bribe a football player was affirmed.

(9) IV. The maximum penalty provided for Bribery in athletic contests is a fine of $10,000 and imprisonment for ten years. Appellant contends this is an excessive fine and a cruel and unusual punishment prohibited by Article 1, Section 17, of the Constitution of Iowa. It appears the legislature gave careful consideration to the penalties provided by the statute. The "Explanation" attached to the bill refers to "the all too successful efforts of professional gamblers to bribe participants in athletic contests as a means of inducing them to 'throw' such contests" and recommends that the penalties "be severe enough to deter bribery by the 'tin horn sport' who has infested the sports scene." The legislature determined what penalties would be sufficient to suit that purpose. They do not appear unreasonable. We are satisfied they do not violate Section 17 of Article 1, of the Constitution of Iowa. See *State v. Burris*, 194 Iowa 628, 638, 639, 190 N. W. 38, 42, 43; 24 C. J. S., Criminal Law, Sec. 1978; 15 Am. Jur., Criminal Law, section 535.

(10). V. Error is assigned to the order overruling appellant's motions for directed verdict, in arrest of judgment, and for new trial. It is contended the evidence of an "offer to bribe" was insufficient to support that charge. The charge against appellant was not in that language. It was charged he offered to give money to Bumbry with intent to influence him to fix the score of the game. The testimony of Bumbry may be fairly interpreted as showing such offer and intent. His testimony is supported by the testimony of other witnesses and by circumstances shown in the record. The rule is well settled in determining a defendant's motion for directed verdict the record will be viewed in the light most favorable to the state. *State v. Rutledge*, 243 Iowa 179, 183, 184, 47 N. W. 2d, 251.

(11) We conclude the evidence was sufficient to require submission of the case to the jury.

(12) VI. Errors are assigned to instructions defining several words. Only the propositions raised in the trial court will be considered. Complaint is made of the definition of the word "feloniously". However, the definition given does not differ substantially from the definition appellant requested the Court to give. Hence, no error may be predicated upon it.

(13) The complaint in the trial court about the definition of "bribery" was that it was made applicable to prospective participants in an amateur game and was contrary to the meaning of the word prior to the adoption of the statute. The defining of the word bribery may have been unnecessary, because the charge was merely that appellant offered to give money to Bumbry with intent to influence him to fix the score. However, it was not error to limit the definition of this word, "as applied to this case" and in the light of the statute.

(14) As to the word "offer" appellant complains because the court added to a dictionary definition "and hence no actual tender or production of any money need be made." The quoted statement is correct and made the definition apply to the factual situation at hand. No error appears here.

VII. The court adjudged that defendant be committed to the men's Reformatory at Anamosa for an indeterminate period not to exceed ten years. Appellant contends this was erroneous for the reason that the crime of which he was convicted was not a felony and hence not punishable by imprisonment in the penitentiary or reformatory.

Code Section 739.12 is almost the same as a Pennsylvania statute, Purdon's Penn. Statutes Ann. Title 18, Sec. 4614, from which it was taken. However, the Pennsylvania statute provides one committing bribery in athletic contests is guilty of a misdemeanor and "shall be sentenced to pay a fine not exceeding ten thousand dollars ($10,000) or undergo imprisonment not exceeding ten (10) years, or both". The Iowa statute does not state the offense is a felony or a misdemeanor nor does it specify the place of im-

prisonment. It provides merely that one committing the offense "shall be sentenced to pay a fine not exceeding ten thousand dollars, or undergo imprisonment not exceeding ten years, or both".

Code section 687.2, Code of Iowa 1954, I. C. A., provides:

> "A felony is a public offense which may be punished with death, or which is, or in the discretion of the court may be, punished by imprisonment in the penitentiary or men's reformatory."

Although the rule in some states is different, most of them have similar statutes. 22 C. J. S., Criminal Law, Sec. 6; 14 Am. Jur., Criminal Law, Section 13. Code section 687.4 provides every other public offense is a misdemeanor.

(15, 16) There are various distinctions between the two grades of offenses. Two important ones are that one convicted of a felony (only) loses the privileges of citizenship and if sentenced to the penitentiary is, with certain exceptions, subject to the indeterminate sentence statute. It is not essential that any criminal statute shall declare in terms that its violation shall constitute a misdemeanor or a felony. A public offense will be a felony or a misdemeanor according to the punishment which may be imposed therefor. *Bopp v. Clark*, 165 Iowa 697, 701, 702, 147 N. W. 172, 52 L. R. A., N. S. 493.

In 24 C. J. S. Criminal Law, Sec. 2000, p. 1247, the text states: Generally, when a statute prescribes the punishment of imprisonment without specifying the place thereof, it implies imprisonment in the common jail or prison of the county, rather than in the penitentiary, * * *"

Brooks v. People, 14 Colo. 413, 415, 24 P. 553, states:

> "* * *. It will be noticed that the statute upon which this prosecution is based is silent in reference to the place of confinement; and, unless some other act can be found making the offense a felony, it is clear that a conviction will only authorize a confinement in that institution considered the less penal, to-wit, the county jail. This is in accordance with a fundamental rule governing the construction of criminal statutes, which requires that, in case the statute admits equally of two

> constructions, that which is the more favorable to the defendant is to be preferred; and when the statute is silent as to the place of imprisonment, there being county jails for persons convicted of misdemeanors, and a penitentiary for those guilty of higher crimes, the former, rendering the punishment less severe, must be selected."

In the language of *Gherna v. State*, 16 Arizona, 344, 146 P. 494, 499, Ann. Cas. 1916D, 94, 99:

> "There is also a rule that where a statute is silent as to the place of imprisonment, and any doubt exists as to whether it should be in the penitentiary or county or local jail, the defendant should have the benefit of the doubt and be incarcerated in the county or local jail."

In *Ex parte Cain*, 20 Okl. 125, 132, 93 P. 974, 976, the court said: "The word 'imprisonment" means imprisonment in the county jail or local prison unless expressed to be in the penitentiary."

In *Walden v. State*, 50 Fla. 151, 39 So. 151, defendant was convicted of carnal knowledge of an unmarried female under eighteen. The penalty provided was imprisonment not more than ten years or a fine not exceeding $2,000, or both. Held imprisonment should be jail under a statute providing imprisonment should be in jail unless expressly directed to be in the penitentiary.

People v. Hightower, 414 Ill. 537, 112 N. E. 2d 126, 129, states the omission of place of confinement in a penal statute raises a conclusive presumption that the confinement should be in the county jail.

Among other decisions are *State v. Toy*, 65 Mont. 230, 211 P. 303; *Commonwealth ex rel. Stuckey v. Burke*, 165 Pa. Super. 637, 70 A. 2d 466, 467; *State v. Masteller*, 232 Minn. 196, 45 N. W. 2d 109.

Ex parte Schiaffino, 70 Cal. App. 65, 232 P. 719, involved a conviction under a statute which provided for punishment "'by imprisonment for a term not less than twenty-five nor more than forty years'", but did not specify the place of confinement or declare the crime to be a felony. Holding

the offense must be deemed a misdemeanor punishable by imprisonment in the county jail the court states:

> "Though it seems an absurdity that one convicted of a crime which is punishable by imprisonment for not less than 25 years should be confined in a county jail rather than in the state prison, the language of the section does not permit any other interpretation."

This decision was overruled by *Ex parte Wilson*, 196 Cal. 515, 238 P. 359, 361, on the ground another section of the same statute stated burglary was punishable by imprisonment in the state prison, that this offense, Burglary with Explosives, was burglary more aggravated in character, and that the various sections should be read together and construed as though constituting a single section. The court took into consideration that the quantum of the punishment, 25 to 50 years, bore no natural nor reasonable relation to the kind of punishment contended for. However, the decision stated, "it may be conceded that under a statute omitting to declare the offense therein defined to be a felony, and which does not provide that the punishment to be inflicted shall be incarceration in a state prison, only misdemeanor punishment can be imposed."

The Iowa statute entitled, "Bribery in athletic contests", was, by the Code Editor, placed in Chapter 739, Code of Iowa, 1954, I. C. A., entitled "Bribery and Corruption.' Other offenses in that chapter include misdemeanors and felonies. Nothing in any other section of the chapter tends to indicate this offense is a felony. Although there are no constitutional or statutory provisions specifically limiting it, no Iowa statute, called to our attenton, provides for a jail sentence of more than one year for a single offense. However, the Pennsylvania statute, with the same stated penalties as in this case, makes the offense a misdemeanor. Hence, the relation the quantum of punishment would bear to the kind of punishment (a jail sentence) should not be considered altogether unreasonable.

(17, 18) The rule is well settled that criminal statutes are to be strictly construed and doubts, if any, resolved in favor of the accused. *State v. Hill*, 244 Iowa 405, 57 N. W.

2d 58, and citations: *State v. Hansen*, 244 Iowa 145, 55 N. W. 2d 923. In the light of that rule we are constrained to hold the language of Code section 739.12 makes its violation a misdemeanor rather than a felony. Consequently, the sentence imposed upon appellant was erroneous. Under the circumstances this court will remand the case for correct judgment against and sentence of appellant. *State v. Barlow*, 242 Iowa 714, 46 N. W. 2d 725, and citations; *State v. Tucker*, Iowa 24 N. W. 2d, 460 and citations.

Therefore, the part of the judgment adjudging that appellant be committed to the men's Reformatory at Anamosa for an indeterminate period, is set aside and the cause is remanded to Polk District Court for judgment sentencing appellant to pay such fine, not exceeding $10,000, or undergo such imprisonment in the county jail, not exceeding ten years, or both, with costs, as the trial court may determine is proper.

Modified, affirmed and remanded.

All justices concur.

APPENDIX B

STATE OF IOWA, *Appellee*

v.

FLOREN DI PAGLIA, *Appellant*

No. 48937

Supreme Court of Iowa.

Sept. 18, 1956.

C. T. Cardamon, R. E. Hanke, Des Moines for appellant.

Dayton Countryman, Atty. Gen., Raphael R. R. Dvorak, George C. West, Asst. Attys. Gen., Leo J. Tapscott, County Atty., Polk County, Des Moines, for appellee.

HAYS, Justice.

This case is here for the second time. See *State v. Di Paglia*, Iowa, 71 N. W. 2d 601.

Appellant was indicted and convicted of bribery in an athletic contest, Section 739.12, Code of 1954, I. C. A. He was sentenced to an indeterminate period not to exceed ten years in the Mens' Reformatory at Anamosa, Iowa. On appeal the judgment was modified, affirmed, and remanded. We held the crime with which he was charged was not a felony and remanded the same for judgment accordingly.

Upon the remand the trial court entered judgment of a term of five months at hard labor in the Polk County Jail, and to pay a fine in the sum of $1,000. Upon failure to pay the fine, the defendant should be committed to the jail for an additional period of time at the rate of $5. per day; same to run consecutively with the five months. It is from this judgment that the present appeal was taken.

Appellant assigns three errors. (1) Section 739.12 Code of 1954, I. C. A., is unconstitutional in that it violates the provisions of Article I, Section 17, Iowa Constitution, I. C. A. (2) Section 739.12, Code of 1954, I. C. A., violates Article I, Section 6, Constitution of Iowa. (3) Section 739.12, Code of 1954, I. C. A., violates the provisions of the 14th Amendment, U. S. Constitution.

This being the second appeal, the question of the law of the case is important. In *Des Moines Bank & Trust Co. v. Iowa Southern Utilities Co.*, 245 Iowa 186, 61 N. W. 2d 721, 726, we said: "We are firmly committed to the doctrine that the legal principles announced and the views expressed by us in an opinion, right or wrong, are conclusively binding, throughout further progress of the case, upon the litigants, the trial court upon remand and this court in later appeals. Likewise, matters necessarily involved in the determination of a question are settled by the opinion when such matters are again presented on a subsequent appeal." See also: *Lawson v. Fordyce*, 237 Iowa 28, 21 N. W. 2d 69; 5 C. J. S. Appeal and Error, Section 1821 and 1825. It is appellee's contention that all matters here raised were determined in the former appeal, and it thus is necessary to examine that decision.

(1) The statute under consideration in the first appeal is the same one here assailed, i. e., Section 739.12, Code of

1954, I. C. A. In the former appeal the constitutionality of the statute was assailed; it being specifically alleged that it violated Article I, Section 9, Iowa Constitution; Article I, Section 17, Iowa Constitution; and the 5th and 14th Amendments, U. S. constitution. On each contention the decision was adverse to appellant. On this appeal it is asserted to be violative of Article I, Section 17, and Article I, Section 6, Iowa Constitution, and the 14th Amendment, U. S. Constitution. Thus it is apparent that as to Section 17, Article I, Iowa Constitution, and the 14th Amendment, U. S. Constitution, these were categorically submitted and determined on the former appeal; and are clearly within the rule of "the law of the case". On this appeal for the first time, it is urged that the statute violates Article I, Section 6, Iowa Constitution. Does this present a new issue? We hold it does not.

(2) It is the established rule that appeals may not be by piecemeal. 5 C. J. S., Appeal and Error, Section 1825; *Lawson v. Fordyce, supra.* This appeal, as did the former one, involves the validity of Section 739.12, Code of 1954, I. C. A. Having raised that question on the former appeal and having had a determination that such statute was constitutional, such is the law of the case and may not again be argued, even though a different reason for so claiming is now urged.

The foregoing disposes of all errors assigned. For reasons above stated the judgment of the trial court is affirmed.

Affirmed.

All Justices concur.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

FLOREN DI PAGLIA,
Petitioner

vs.

STATE OF IOWA,
Respondent

BRIEF IN BEHALF OF STATE OF IOWA, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner was indicted and convicted, after trial to a jury, of bribery in an athletic contest, it having been charged that he offered money to Benjamin James Bumbry, Jr., a Drake University player, with intent to influence him to fix the score in a basketball game on December 22, 1953 at Des Moines, Iowa, between that University and Iowa State College. He was sentenced to an indeterminate term not to exceed ten years in the Men's Reformatory at Anamosa, Iowa.

On appeal the Supreme Court of Iowa held, on July 27, 1955 (Rehearing denied October 21, 1955), that the crime with which he was charged was not a felony, and modified and affirmed the judgment of conviction and remanded the cause to the Polk County District Court for judgment sentencing the petitioner to pay "such fine, not exceeding $10,000, or undergo such imprisonment in the county jail, not exceeding ten years, or both, with costs, as the trial court may determine is proper." (*State v. Di Paglia,* 247 Iowa ..., 71 N.W. 2d 601).

Upon the remand, the District Court of Polk County, Iowa, after hearing had and evidence presented, entered judgment sentencing petitioner to a term of five months at hard labor in the Polk County Jail, and to pay a fine of $1,000, and providing that upon failure to pay the fine, the petitioner should be committed to the jail for an additional period of time at the rate of $5.00 per day, same to run consecutively with the five months. The petitioner appealed from this judgment to the Supreme Court of Iowa, and on September 18, 1956, said Court affirmed the same. (*State v. Di Paglia,* ... Iowa ..., 78 N.W. 2d 472). Subsequently and within the time required by law a petition for rehearing was filed by petitioner, and resistance thereto filed by the State. Rehearing was denied on November 16, 1956, and the case is now pending in this Court upon petition for writ of certiorari.

It is petitioner's contention herein that the statute, Section 739.12, Code of Iowa 1954, is void and in violation of rights protected by the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

THE IOWA STATUTE CREATING THE OFFENSE OF BRIBERY IN AN ATHLETIC CONTEST AND PROVIDING FOR A PENALTY OF A FINE NOT EXCEEDING TEN THOUSAND DOLLARS OR IMPRISONMENT NOT EXCEEDING TEN YEARS, OR BOTH, FOR VIOLATION THEREOF (SECTION 739.12, CODE OF IOWA 1954), IS NOT VIOLATIVE OF THE CONSTITUTIONAL PROVISIONS AGAINST CRUEL AND UNUSUAL PUNISHMENTS AND DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION. ONE CHALLENGING A STATUTE HAS THE BURDEN TO OVERCOME THE PRESUMPTION THAT IT IS CONSTITUTIONAL AND TO CLEARLY SHOW IT TO BE INVALID.

In 1953 the Iowa Legislature created an offense which it named "Bribery in athletic contests". Clearly it was empowered to do that. It then proceeded to define the offense in detail, and provided for penalties to be assessed against one guilty of committing the offense. The maximum penalty provided for "Bribery in athletic contests" under the Iowa Statute is a fine of $10,000 and imprisonment for ten years. The Supreme Court of Iowa held the crime denounced by the statute (Section 739.12, Code of Iowa 1954), not to be a felony. Petitioner herein contends that since an offender may, under the Supreme Court's holding, be required to serve the maximum penalty provided for in a county jail, rather than in a state penitentiary or reformatory, that the punishment provided for is so "cruel and unusual" as to cause it to fall within the prohibitions of the due process clause of the Fourteenth Amendment to the Federal Constitution. With this contention, respondent cannot agree.

A large discretion is vested in a state legislature in the fixing of penalties imposed by a statute to effectuate the manifest intent of the legislature to suppress the notorious mischief and evil that it intended to prohibit by the enactment of its statute. Punishment by fine and imprisonment, is not per se cruel and unusual. *Bailey v. United States*,

C.C.A. Ill., 284 F. 126; *People ex rel Bradley v. Illinois State Reformatory*, 148 Ill. 413, 36 N.E. 76; *Hobbs v. State*, 133 Ind. 404, 32 N.E. 1019; *State v. Staub*, 182 La. 1040, 162 So. 766. Sentences consisting of both fine and imprisonment, as authorized by statute, rest in the Court's discretion and are not cruel and unusual. *People v. Elliott*, 272 Ill. 592, 112 N.E. 300; *Pervear v. Massachusetts*, 5 Wall. (U.S.) 475, 18 L. ed. 608. Nor is the imposition of a term of imprisonment on failure to pay a fine cruel and unusual punishment, although by reason of the amount of numerous fines in the aggregate the imprisonment will require several years of work. *Foertsch v. Jameson*, 48 S.D. 328, 204 N.W. 175; *Ex parte Brady*, 70 Ark. 376, 68 So. 34. And punishment will not be declared excessive merely because confinement might undermine the health of one convicted of crime. *State v. Van Klavern*, 208 Iowa 867, 226 N.W. 81.

A constitutional prohibition against cruel and unusual punishment is directed primarily against the character of the punishment rather than against its amount or duration, and refers to inhuman or barbarous treatment, and the fact that the punishment authorized by statute may be severe does not make it cruel or unusual. *Ex parte Garner*, 179 Cal. 409, 177 P. 162; *Kistler v. State*, 190 Ind. 404, 129 N.E. 625; *State v. Spano*, 320 Mo. 280, 6 S.W. 2d 849; *Ginsberg v. United States*, C.C.A. Tex., 96 F. 2d 433.

"Cruel" as applied to punishment for crime refers to form of punishment and "unusual" refers to its frequency. *State v. Kingen*, 58 N.D. 327, 266 N.W. 505. Ordinarily, "cruel and unusual" punishment implies something inhuman and barbarous, or some punishment unknown at common law such as burning at the stake, breaking on the wheel, and the like, or some degrading punishment which the public sentiment must be regarded as having condemned as cruel or which, if ever employed at all, had become altogether obsolete in the state prior to the adoption of its constitution. *People v. Callicott*, 322 Ill. 390, 153 N.E. 688; *Ellis v. State*, 54 Okl. Cr. 295, 19 P. 2d 972. Moreover, the discretion of a state legislature will be interfered with only in extreme cases or unless the penalty prescribed by the statute is *clearly* and manifestly cruel and unusual. *Moore v.*

Aderhold, C.C.A. Kan., 108 F. 2d 729; *People v. Callicott*, supra; *Crutchfield v. Commonwealth*, 248 Ky. 704, 59 S.W. 2d 983. Thus a punishment authorized by statute is never held cruel or unusual or disproportionate to the nature of the offense unless it is a barbarous one unknown to the law or so wholly disproportionate to the nature of the offense as to shock the moral sense of the community. *Moore v. Aderhold*, supra; *People v. Elliott*, 272 Ill. 592, 112 N.E. 300.

Respondent has been unable to find a single case decided by any appellate court of last resort wherein such tribunal has concurred in petitioner's novel contention that a state penitentiary should be considered less penal than a county jail (this contention being made despite an entire absence in the printed record of any evidence to support petitioner's inferences as to the condition of county jails in the State of Iowa). Indeed, where the question has been considered, the courts have unanimously adopted the contrary position, namely, that confinement in a county pail is considered less penal than confinement in a state penitentiary, and that in case any doubt exists as to whether confinement should be in the penitentiary or a county jail the defendant should have the benefit of the doubt and be incarcerated in the latter institution. See *Brooks v. People*, 14 Colo. 413, 24 P. 553. *Gherna v. State*, 16 Ariz. 344, 146 P. 494; *State v. Masteller*, 232 Minn. 196, 45 N.W. 2d 109. Respondent submits that due process is not to be turned into a destructive dogma in the administration of systems of criminal justice, that it should not be used to furnish opportunities previously uncontemplated for opening wide the prison doors of our land, and that it was never intended to abridge the selection of the law-making power of the states of such kinds of punishment as they might deem most effective in the suppression of crime.

The statute here under attack was declared by the Supreme Court of Iowa, after a careful review of petitioner's complaints, not to be violative of the State's constitutional provisions against cruel and unusual punishment. (*State v. Di Paglia*, 247 Iowa . . ., 71 N.W. 2d 601, 604-5). Since the statute is not in violation of the Iowa Constitution, and

since the Eighth Amendment to the Federal Constitution in no way can apply in the case at bar, any punishment assessed by a trial court within the limits fixed by the statute cannot be said as a matter of law to be so "cruel and unusual" as to violate the Federal constitutional provisions relating to due process. One challenging a statute has the burden to overcome the presumption it is constitutional and to negative every reasonable basis on which it may be sustained. In this case petitioner has not met this burden.

CONCLUSION

For the foregoing reasons we respectfully request that petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

NORMAN A. ERBE,
Attorney General of Iowa,
State House,
Des Moines 19, Iowa

RAPHAEL R. R. DVORAK,
First Assistant Attorney General,
State House,
Des Moines 19, Iowa

DON C. SWANSON,
Assistant Attorney General,
State House,
Des Moines 19, Iowa
Attorneys for State of Iowa, Respondent

APPEARANCE

I, Don C. Swanson, a member of the Bar of the Supreme Court of the United States, do hereby enter my appearance as associate counsel for the State of Iowa, Respondent.

DON C. SWANSON,
State House,
Des Moines 19, Iowa

PROOF OF SERVICE

I, Don Hise, Attorney for Petitioner, Floren Di Pagiia, hereby acknowledge receipt of a copy of the foregoing Brief in behalf of State of Iowa, Respondent, in opposition to Petition for Writ of Certiorari, this .... day of February, 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

FLORIDA DE PAOLA,
Petitioner,

vs.

STATE OF IOWA,
Respondent.

BRIEF IN BEHALF OF STATE OF IOWA, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counsel for Respondent:

DON C. SWANSON,
Assistant Attorney General of Iowa,
State House,
Des Moines 19, Iowa.

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